No. 84-1868

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PENNZOIL COMPANY,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA IN OPPOSITION TO PETITION

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June 28, 1985

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, under Section 602 of the Natural Gas Policy Act of 1978, 15 U.S.C. §3432, the price of gas Petitioner produces in West Virginia and sells to its retail customers in West Virginia is properly regulated by the Public Service Commission of West Virginia.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT	1
REASONS FOR DENYING WRIT	2
A. The FERC's Order Specifying That a "First Sale" Occurs At The Wellhead Does Not Negate the West Virginia Commission's Jurisdiction Over Petitioner's Sales of West Virginia Production At Retail Within the State	3
B. Petitioner's Other Arguments	6
CONCLUSION	7

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STATEMENT

This is the second petition for certiorari the petitioner Penzoil Company has filed from actions of the Supreme Court of Appeals of the State of West Virginia affirming orders of the West Virginia Public Service Commission (Commission) of May 15, 1984 and August 10, 1984 in two successive Pennzoil rate proceedings, holding that the rates charged by the petitioner for sales of the gas it produces in West Virginia for sale at retail and consumption within the state are subject to the Commission's jurisdiction under the laws of the state, as expressly preserved by Section 602 of the Natural Gas Act of 1978, 15 U.S.C. §3432(a).[1] The previous petition in No. 84-569 was denied by the Court on December 3, 1984 *Pennzoil Company* v. *Public Service Commission of West*

[1] An earlier 1981 Commission order reaching a similar result, from which the Supreme Court of West Virginia had denied review, was vacated on petitioner's petition for certiorari for further consideration in the light

Virginia, 105 S. Ct. 566 (1984). In all respects material to the present petition the Commission's order in the present case (Pet. App. C) adopts the findings and conclusions in its prior case. The Supreme Court of Appeals of West Virginia, which had denied leave for review of the Commission's May 1984 order, issued an opinion in the present case (Pet. App. A) which affirmed the Commission's August 1984 order in all respects.

REASONS FOR DENYING THE WRIT

The same reasons that led this Court to deny an earlier petition for a writ[2] presenting virtually identical questions[3] involving the same parties and the same facts require denial of the instant petition. In sum, the decision of the Supreme Court of Appeals of West Virginia affirming a decision of the Public Service Commission setting the price for petitioner's West Virginia gas production which is sold to retail customers in the State does not raise any special or important issue of national concern justifying this Court's granting a writ of certiorari.

The decision of the Supreme Court of Appeals, reprinted in the Appendix to the Petition (hereinafter "Pet. App.") at 1a-10a, addresses the limited facts of this matter, does not conflict with the decision of any other state court of last resort or federal court of appeals, and is consistent with the applicable federal and state statutes and with the prior decisions of this Court. Moreover, other than petitioner's repeated attempts to bring the matter before this Court, the facts involved do not

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of *Public Service Commission of the State of New York* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983). See *Pennzoil Co.* v. *Public Service Commission of West Virginia*, 103 S.Ct. 3564 (1983).

[2] *Pennzoil Co.* v. *P.S.C. of West Virginia*, 105 S. Ct. 566 (1984).

[3] Indeed, a substantial portion of petitioner's argument in the instant petition repeats, virtually word-for-word, the same arguments made in the earlier petition. *Compare* instant petition, at 17-22, *with* "Petition for a Writ of Certiorari" filed in *Pennzoil Co.* v. *P.S.C. of West Virginia*, No. 84-569, at 18-24 (October Term, 1984). The remainder of petitioner's argument is merely a variation on the same theme as found in the earlier petition.

present a recurring pattern in West Virginia or other States. This is nothing more than a parochial matter involving a small portion of petitioner's West Virginia gas production.

A. The FERC's Order Specifying that a "First Sale" Occurs at the Wellhead Does Not Negate the West Virginia Commission's Jurisdiction Over Petitioner's Sales of West Virginia Production at Retail Within the State

Petitioner's claim of lack of State jurisdiction over the pricing of gas produced for retail sale in the State is based upon the Federal Energy Regulatory Commission's (FERC) issuance of its Order No. 391, Pipeline Production Under Section 2(21) of the Natural Gas Policy Act of 1978, 49 Fed. Reg. 33, 849 (1984), *as corrected*, 49 Fed. Reg. 39,293 (1984). Order No. 391 implemented the decision in *Public Service Commission of New York* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983), by including in its regulations as part of its definition of "first sale" the intracompany transfer of gas produced by the company. As pertinent to this case the FERC's regulation reads:

> *First sales by a local distribution company.* A transfer, at the wellhead, of gas produced by a local distribution company's production unit is that company's first sale under the NGPA.

49 Fed. Reg. 39,293 (1984). (To be codified at 18 C.F.R. §270.203(b) (3)).

Petitioner contends the rule "is critical to this case." (Pet. at 11.) Petitioner's reasoning apparently follows along these lines: because the FERC's definition sets the point of transfer at the wellhead, and because some of petitioner's gas from some of petitioner's wells[4] eventually is sold for resale in interstate

[4]Petitioner's schematic, Pet. at 6, may present one type of retail sale pattern in West Virginia. But it should be recognized that in many cases petitioner's produced gas is never sold to an interstate pipeline for resale,

commerce, federal jurisdiction over interstate sales for resale automatically attaches at the wellhead and precludes state regulation of gas production sold at retail within West Virginia. Pet. at 12-13.

Petitioner's argument, as recognized by the Public Service Commission of West Virginia (PSC), the Supreme Court of Appeals and the FERC, begs the question of "whether Section 602(a) [of the NGPA, 15 U.S.C. §3432(a)] allows the PSC" to set prices for petitioner's production of gas sold at retail in West Virginia. Pet. App. at 7a. The PSC in its decision from which the earlier petition for writ of certiorari was sought expressly found that "Pennzoil's own gas production in West Virginia, which is used for utility purposes, constitutes a first sale of gas." Appendix to Petition in No. 84-569, *supra*, at 22a. The PSC went on to find that Congress granted "the various States . . . the authority to establish maximum lawful prices for a first sale of natural gas" produced, sold and consumed within the state through Section 602(a) of the NGPA. *Id.* at 22a. This latter conclusion formed the basis for the PSC's establishment of a price for petitioner's production of gas sold to retail customers in West Virginia.

Likewise, the FERC found that a "first sale" should be defined as including intracompany transfers, at the wellhead, of gas produced by both intrastate pipelines and local distribution companies. 49 Fed. Reg. 39,293 (1984). This definition was not viewed by the FERC as requiring, either under the NGPA or this Court's decision in *Mid-Louisiana, supra*, that the FERC assert jurisdiction over all such gas production. Rather, the FERC recognized that by applying a uniform definition of the location of the first sale for the interstate and intrastate markets it was acting consistently with the NGPA's purpose of eliminating dual markets. At the same time, the FERC indicated that this definition "would not conflict with the traditional retail jurisdiction of the state regulatory agencies." 49 Fed. Reg. at 33,856 (1984). Like the PSC, the FERC realized that defining a first sale was only a

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and, in many other cases, petitioner's gas is not commingled with another producer's gas prior to or after petitioner's retail sale in West Virginia.

same points, Pet. App. at 8a-10a, and to the PSC's "Brief in Opposition To Petition" filed in No. 84-569, at 8-10 (October Term, 1984).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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